No. 11713

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FREDERICK JOHN WOLFE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

UPON PETITION TO REVIEW A DECISION OF THE TAX COURT OF THE UNITED STATES

REPLY BRIEF FOR PETITIONER

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The petitioner's brief was filed with the Clerk of this Court on January 12, 1948.

The respondent's brief was filed with the Clerk of this Court on or about March 18, 1948.

A motion to extend petitioner's time to reply to May 15, 1948 was granted by this Court on March 17, 1948.

Reply to Respondent's Argument

The respondent has not attempted to answer the arguments presented in petitioner's main brief. Rather, he seeks to justify the decision of the Tax Court by a reitera-

tion of the errors, misconceptions and immaterial matters relied upon by the Tax Court in its opinion.

The petitioner does *not* dispute that pensions or retiring allowances are ordinarily income to the recipients. However, the instant case cannot be decided by a mere reference to section 22 (a) of the Internal Revenue Code and the Treasury Department Regulations thereunder. Section 22 (a) of the Code is, as its title states, a "General Definition". It must be read in conjunction with the other applicable provisions of the Code. For example, if we looked only to section 22 (a), we would say that *all* interest is includible in gross income since the section states that " 'Gross income' includes . . . interest. . . ." However, upon reference to section 22 (b)(4), we find that interest of certain types is to be *excluded* from gross income. Similarly, the question of the inclusion of a "dividend" cannot be determined solely by a consideration of section 22 (a); reference must also be made to section 115 to determine what dividends are to be included and what dividends are to be excluded, as for example, certain types of stock dividends and dividends from earnings or profits accumulated before March 1, 1913. Likewise, in the instant case, section 22 (a) must be considered in conjunction with section 22 (b)(2).

Section 22 (b)(2) of the Internal Revenue Code provides now, as it did in 1941, that in the case of amounts received as an annuity "there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity. . . ." Section 162 (c) of the Revenue Act of 1942 added to section 22 (b)(2) a new subparagraph (B) reading as follows:

> "Employees' Annuities.—If an annuity contract is purchased by an employer for an employee under

a plan with respect to which the employer's contribution is deductible under section 23 (p) (1) (B), or if an annuity contract is purchased for an employee by an employer exempt under section 101 (6), the employee shall include in his income the amounts received under such contract for the year received except that if the employee paid any of the consideration for the annuity, the annuity shall be included in his income as provided in subparagraph (A) of this paragraph, the consideration for such annuity being considered the amount contributed by the employee. In all other cases, if the employee's rights under the contract are nonforfeitable except for failure to pay future premiums, the amount contributed by the employer for such annuity contract on or after such rights become nonforfeitable shall be included in the income of the employee in the year in which the amount is contributed, which amount together with any amounts contributed by the employee shall constitute the consideration paid for the annuity contract in determining the amount of the annuity required to be included in the income of the employee under subparagraph (A) of this paragraph."

The year here involved is, of course, 1941 and not 1942 a later year. However, in supporting the contention re advanced by the respondent, the Court in *Hackett* v. *n'r* [5 T. C. 1325, aff'd 159 F. (2d) 121, C. C A. 1] held the second sentence of section 22 (b)(2)(B) was merely laratory of previously existing law. In its opinion the Court said:

"This Court was aware of the new subparagraph (B) at the time we decided the *Brodie* case. See page 285 of our opinion in that case. Nevertheless, we interpreted the existing law as meaning the same as is provided by the second sentence of new subparagraph (B), and we have been affirmed in other cases which followed the *Brodie* decision."

Similarly, in its opinion, the Circuit Court of Appeals for the First Circuit said:

> "We do not feel that § 22 (b)(2)(B) should be construed as effecting or intending change in the law in this respect."

The same result is also necessarily implied by the other decisions referred to on pages 64 and 65 of our main brief.

In the *Hackett* case, the taxpayer's employer in 1941 purchased an annuity contract for him. He contended that the consideration paid by his employer for the annuity did not constitute income to him in 1941 for various reasons including the following: (1) Since the taxpayer had had no option to receive cash instead of the contract and he had no right to assign, alienate or commute the contracts,[1] he did not "constructively receive" the consideration paid by his employer and, therefore, did not receive income, and (2) The consideration paid by his employer would not be considered as "consideration paid" for the annuity in determining the amount to be reported under section 22 (b)(2) when the annuity was paid in future years. In other words, the respondent in this case is adopting the arguments advanced by the taxpayer in the *Hackett* case which are entirely inconsistent with the arguments which the respondent there advanced and which the Circuit Court of Appeals accepted. Thus, when he says (Resp. Brief p. 24) that "Since the taxpayer did not receive the sum of $415,000, there is no factual basis for a conclusion that the payments made to him after his retirement were made as annuities within the meaning of Section 22 (b)(2)", he is making exactly the same argument which the Circuit Court of Appeals for the First Circuit rejected in the *Hackett* case.

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[1] It may be noted that in the instant case there was no restriction against the transfer or assignment of the contract.

Respondent quite correctly says (Resp. Brief p. 19) that The taxpayer's entire case must rest upon the fact that nglo paid Standard about $415,000 in consideration of tandard's promise to pay the taxpayer $3,038.75 per month, r $36,465 per year, ...'' Similarly, the respondent's en- re case in *Hackett* v. *Com'r* rested upon the fact that the mployer paid an insurance company a sum of money in onsideration of the insurance company's promise to pay the axpayer an amount per year during his lifetime. The only ifference is that in one case an insurance company is in- olved, whereas in the other, an insurance company is not avolved. That Standard was not a commercial insurance ompany is entirely immaterial under the decisions cited n page 52 of petitioner's main brief.

The respondent argues (Resp. Brief p. 20):

> ''. . . The taxpayer construes the contract of March 22, 1940, as the purchase of an annuity by Anglo, and contends that he in effect received $415,000 when this contract was consummated, which represents his cost of the annuity. (Br. 66.) This argument overlooks the fact that the transaction might have been either one of two things: (1) A substitution of Standard for Anglo, in which event the payments were pensions because they were made solely on account of taxpayer's 38 years of service to Standard or to a company affiliated with or controlled by Standard; or (2) the purchase of an annuity in which event the cost of about $415,000 would have been considered taxable income to the taxpayer in the year of purchase.''

We do contend that the taxpayer, in effect, received 415,000 when the contract was consummated, not, however, the sense that he had the option to take the cash or that e ''constructively'' received it, but in the sense that, as

in the *Hackett* case, the taxpayer received a valuable contract which in the language of the Circuit Court of Appeals in that case "constituted an economic benefit conferred as additional compensation which is the equivalent of cash". As was held in the *Hackett* case, we also contend that the amount paid by the employer to secure for the employee that valuable contract right represented the "consideration paid" therefor within the meaning of section 22 (b)(2).

We have not overlooked either of the two points mentioned by the respondent. Clearly, there *was* a substitution of Standard for Anglo, but the conclusion drawn from that fact by the respondent does not follow. Anglo *bought* the substitution of Standard by paying $415,000 (R. p. 24). In *Freeman* [4 T. C. 582] the employer bought the substitution of an insurance company for his obligation to make payments to his employee.[2] The very connotation of purchasing an annuity is buying the obligation of another.

With respect to respondent's second point, we contend that the cost of about $415,000 did constitute income to the taxpayer, and that fact is fundamental in our argument. The reference by the respondent to "taxable" income will be considered *infra*.

The basic principle underlying the *Hackett* case and every other case involving this point is that when an employer purchases for an employee the promise of another to make payments to the employee in the future, he is, at that time, conferring an economic benefit on the employee which constitutes income to the employee. Clearly, the

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[2] In the *Freeman* case, the annual amount payable under the insurance company annuity contract was *less* than the annual amount the employer had been obligated to pay. Nevertheless, the cost of the annuity contract was determined to be income to the employee.

econd sentence of section 22 (b)(2)(B), which as has been reviously pointed out was merely declaratory of existing w, is based upon the same consideration.

At the specific instance and request of the petitioner, nglo paid the sum of $415,000 in cash to purchase for him tandard's promise to pay him the stated sum during his fetime, and after his death, to his wife for one year if ne survived him, under a contract which contained no re-rictions on transfer or assignment (R. pp. 19, 23-26). bviously, by that payment, Anglo conferred upon the peti-oner an economic benefit which, as we have heretofore ointed out, clearly represented income to him.

Petitioner was throughout the year 1940 a non-resident lien (R. p. 16) and as such, not subject to tax in the United tates. It is significant perhaps that respondent in his rief has not sought to support that portion of the opinion elow (R. pp. 38, 39) to the effect that the amount paid by nglo may not be considered in the application of section 2 (b)(2) because the petitioner did not pay a tax on that mount other than the casual reference to "taxable income" n page 20 of his brief. We have in petitioner's main brief pp. 66, 67) discussed that question and will not repeat he discussion here. The position of the Tax Court on this oint has no more basis to support it than would a con-ention that if the petitioner had received $415,000 in cash nd purchased an annuity, he paid no consideration for the nnuity because he did not, as he was not required to do, ay a United States tax on the receipt of the $415,000. The econd sentence of section 22 (b)(2)(B), which as has been ointed out *supra,* is merely declaratory of previously exist-ng law, states that the consideration paid by the employer hall be income to the employee and shall constitute a part f the consideration paid for the annuity; no reference is

made to whether or not a tax was, in fact, paid upon the income.[3]

In his brief (Resp. Brief p. 17, *et seq.*), the respondent relies heavily upon *Hooker* v. *Hoey* [27 F. Supp. 489, aff'd *per curiam,* 107 F. (2d) 1016 (C. C. A.-2)] as did the Court below in its opinion (R. p. 31). In that case, the taxpayer was receiving a pension from the Vacuum Oil Company. In 1931, the Vacuum Oil Company sold all of its property to Standard Oil Company of New York, the latter company assuming all obligations and liabilities of the Vacuum Company, including the obligation of the Vacuum Company to pay a pension to the petitioner. The taxpayer contended that the amounts thereafter received from Standard Oil Company of New York were annuity payments. In rejecting that argument, the District Court assigned three reasons as follows:

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[3] This case does not involve a situation where the taxpayer is taking inconsistent positions such as where he argues that an amount received in one year should not be included in income because it properly constituted income of a prior year, although he erroneously failed to include it in a prior year. Neither is it a case where the taxpayer seeks to gain an advantage from the fact that he was a non-resident alien in 1940. If the taxpayer had been a citizen of the United States residing in England in 1940, the consideration of $415,000 although constituting income to him under the *Hackett* and related cases, would not have been taxable in the United States by reason of Section 116 of the Internal Revenue Code. In fact, if the taxpayer were a citizen of the United States, then the decision below would have given him a decided advantage. If the amounts paid by Standard are not annuity payments but in the nature of pension payments for services previously rendered outside the United States, then, if the taxpayer were a United States citizen, he would, for 1942 and subsequent years, be permitted to exclude from income the *entire* amounts received from Standard under section 116 (a)(2) as amended by section 148 (a) of the Revenue Act of 1942. Consequently, the position contended for by the petitioner does not operate to give him a tax advantage as contrasted with a United States citizen in similar circumstances, but merely operates to prevent the discrimination which would, under the decision below, operate against him as a resident alien in 1942 and subsequent years.

(1) There was no purchase of an annuity.

(2) There was no annuity contract.

(3) " . . . there is utterly no basis in the facts for the claim that the sum of $79,186.46 or any other particular sum was paid by Vacuum Oil Company to Socony Vacuum Corporation as 'aggregate premiums or consideration' for the latter's assumption of the obligation to pay the plaintiff $11,250 a year for life."

In the instant case, Anglo did, for the sum of $415,000, urchase a contract under which the taxpayer was to receive nnual payments during his lifetime; there can be no dis- ute that the $415,000 was paid for that purpose and none ther (R. p. 24). As the respondent states in his brief (p. 9), it is a fact "that Anglo paid Standard about $415,000 consideration of Standard's promise to pay the taxpayer 3,038.75 per month" for his life and one additional year his wife survived him. Consequently, none of the reasons ssigned by the Court for its decision in the *Hooker* case applicable here. The distinction between the *Hooker* case the one hand and *Hackett* v. *Com'r* and the instant case the other is obvious; in the *Hooker* case, the sale by the nployer of its assets subject to its liabilities did not result the employee receiving "an economic benefit conferred additional compensation which is the equivalent of sh".[4] In the *Hooker* case, no contract was issued to the nployee nor was there any basis for a contention that the ansaction conferred any economic benefit on the employee additional compensation. The purpose of the transaction as not to assure the payments to the employee, nor did acuum pay any particular amount to Socony in considera- on of an agreement by the latter to make payments to the nployee. It would indeed be a novel theory to hold that employee received income in a transaction in which he

[4] *Hackett* v. *Com'r* [159 F. (2d) 121, 123].

received nothing and in which there was no purpose or intent to give him anything, merely because the employer transferred its entire business and assets to another subject to its liabilities.

The respondent contends that the decision below must be affirmed under the so-called *Dobson* rule (*Dobson* v. *Com'r,* 320 U. S. 489, rehearing denied 321 U. S. 231) if the conclusion of the Court below is supported by substantial evidence (Resp. Brief p. 20, *et seq.*). We submit that (1) the issue in this case is purely one of law and, therefore, subject to review, and (2) in any event, there is no evidence, substantial or otherwise, to support the Court's conclusion.

Concededly, the opinion below is to a considerable extent a factual discussion. However, that does not obscure the fact that in the final analysis the issue is one of law, to wit: Did the making of the contract in 1940 result in the receipt by the petitioner of income in that year so that the amounts received under the contract in later years may not be considered as income in full? The Tax Court apparently recognized that when it said in the final paragraph of its opinion (R. p. 39):

> " . . . In our opinion, this is not the class of contract taxable at value to the recipient. The contracts in Renton K. Brodie, supra; William E. Freeman, 4 T. C. 582; Hubbell v. Commissioner, 150 Fed. (2d) 516; Oberwinder v. Commissioner, 147 Fed. (2d) 255; Robert P. Hackett, 5 T. C. 1325, and Ward v. Commissioner ____ Fed. (2d) ____ (Feb. 10, 1947), cited by petitioner, and all cases found by us following them, were all ordinary commercial annuity contracts, purchased by employers from insurance companies for employees; therefore, the fact that they were held taxable to the recipients is no indication that an agreement here by Anglo and Standard to carry out their pension policy should be considered to have

such value as to be taxable to the petitioner as recipient, and therefore offer reason to allow exemption from tax amounts received in later years under the contract."

If the purport of the Court's statement is that the decisions cited apply only to a certain "class of contract" and not to other classes, and that they apply only to "ordinary commercial annuity contracts", that is, we submit, clearly a decision on a question of law. It would be equivalent to a holding that in section 22 (b)(2), the term "annuity" means only an ordinary commercial annuity contract, a holding which this Court has specifically rejected. (*Gillespie v. Com'r*, 128 F. (2d) 140.)

If the purport of the Court's statement is that the contract in question did not have "such value as to be taxable", the Court has, in fact, made no finding of value. It merely states that the fact that contracts issued by insurance companies were held taxable to the recipients is no indication that a contract issued by Standard had "such" value. If, however, the statement was intended to be a "finding", it has absolutely no support in the record. Anglo paid $15,000 in order to secure the contract for the petitioner (R. p. 24), and there is absolutely nothing in the record to create even an inference that the contract did not have a value equal to the consideration paid to obtain it. In fact, as the Court below pointed out, the cost of the contract if purchased from an insurance company, instead of from Standard, would have been about $499,000 (R. p. 37). Certainly, there is no basis for any conclusion that a promise to pay by Standard Oil Company of New Jersey, one of the country's great corporations, is to be considered as of less value than that of the strongest insurance company. The Court below in its opinion stated that the contract was "in the ordinary negotiable or assignable form" (R. p. 39).

Exactly what that statement was intended to imply is not clear. Admittedly, the contract was not in the form of an ordinary negotiable promissory note, nor did it contain any specific provision authorizing assignment. On the other hand, it did not contain any provision forbidding or limiting an assignment (R. pp. 23-26), and we are aware of no reason why the contract could not be assigned by the petitioner. However, it is submitted that there is no necessity for a consideration of that question. The taxpayers in *Hackett* v. *Com'r* had no right to assign, alienate or commute the contracts there involved, or any payments thereunder, and the contracts had no loan or cash surrender value. That fact, however, did not prevent the Court from holding that the consideration paid for such contract by the employer constituted income to the taxpayer.

A substantial part of the opinion of the Court below is directed to a discussion of whether the petitioner received an "annuity" or a "pension" or "benefits from a retirement fund", and it is the Court's conclusion on this point which the respondent suggests is binding, if supported by substantial evidence, upon this Court under the *Dobson* rule (Resp. Brief p. 20).[5]

The fundamental error which the Court below has made on this point is in failing to recognize that a pension is, in fact, a form of annuity. In the ordinary case of a pen-

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[5] One of the petitioner's Statement of Points is that the Tax Court is an administrative agency and its decisions subject to review within the scope of the Administrative Procedure Act (R. p. 57). This issue does not seem to have been definitely decided. (*Lincoln Electric Co.* v. *Com'r,* 162 F. (2d) 379 (C. C. A.-6); *Dawson* v. *Com'r,* 163 F. (2d) 664 (C. C. A.-6); *Credit Bureau of Greater New York* v. *Com'r,* 162 F. (2d) 7 (C. C. A.-2); *Anderson* v. *Com'r,* 164 F. (2d) 870 (C. C. A.-7).) For the reasons hereinafter mentioned, we submit that the decision of the Tax Court involves purely a question of law and is subject to review in any event. Consequently, this brief will not be unduly extended by a discussion of the effect of the Administrative Procedure Act.

n, the recipient may not exclude from gross income any rt of the amount received, not because the pension is t a form of annuity, but because no consideration was ld therefor. However, where a consideration *is* paid, for example where the employee makes some contributions to the pension fund, the pension payments received are taxed in exactly the same manner as any other nuity for which a consideration was paid. This is made ar by the following excerpt from a bulletin [6] issued by e Bureau of Internal Revenue:

> "The terms 'annuity', 'pension', and 'retirement pay' are often confused with each other. Sometimes these terms are used to describe a plan in which an individual invests some of his own money—either with an insurance company or with his employer—in order to assure himself that he will receive a steady income when he reaches a certain age. At other times, the same terms are used to describe payments which are made by an employer entirely out of his own funds to reward a faithful employee.
>
> "For income tax purposes, all of these plans are, in effect, treated alike so that the recipent of an annuity, pension, or retirement pay is allowed to recover his own investment, if any, tax-free but is required to pay tax on the remainder of the benefits that he receives, as explained in the first part of this article. Therefore, in those cases where the employer pays the entire cost of a pension, the retired employee has no cost to recover and his entire pension is taxable as if it were a payment of additional wages and salary."

Although the last sentence quoted refers to cases where e entire cost is paid by the employer, the Bulletin also akes plain that the sentence does not apply where before e employee's retirement the employer makes payments

[6] Your Federal Income Tax (1947 Edition), page 63.

which constitute income to the employee at that time. Thus, it is said:[7]

> "Pensions or retirement pay received from employees' trusts should be treated in the same way as annuities. If the trust is one which meets the statutory tests for exemption from income tax, the amounts, if any, contributed by you as an employee constitute your basic cost of the annuity; if you made no payments to the trust, your cost is zero. If, however, the trust is not exempt from tax, contributions to the trust by the employer are treated as additional compensation to you as the employee, and are taxable to you when credited to the trust, if your rights to a future annuity would not be forfeited by your resignation or discharge occurring before the retirement date. Amounts thus taxed to you as the employee may be treated as part of your basic cost of the annuity."

The Tax Court, by falling into an error of law, has missed the point of the case; it has reasoned that (1) a pension constitutes income and therefore (2) the case must be decided by determining whether the amounts paid to the petitioner constituted "pension" payments. The label which is to be attached to the payments therefore, becomes, in the view of the Tax Court, of paramount importance and decisive of the result. The real and determinative question is ignored by the Court until the last paragraph of its opinion and then that question is, in effect, brushed aside without any legal or factual basis (see discussion, *supra,* p. 10).

This case can be decided only after the fundamental issue has been answered: Did the payment of $415,000 by Anglo and the issuance of the contract by Standard in 1940 result in income to the petitioner at that time? If that question is answered in the negative (which we submit would

[7] *Ibid.* page 63.

erroneous), then it follows that the annual payments ceived by the petitioner constitute amounts taxable to n in full at the time of receipt. If, on the other hand, e question is answered affirmatively, then the principle ntended for by the petitioner automatically follows. If e amount paid by the employer is the employee's income, en the "consideration paid" is from the employee's in- ne which he is entitled to recover in the manner provided section 22 (b)(2). Calling the amounts thereafter paid der the contract a pension, retirement pay or an annuity unimportant; as the Bureau of Internal Revenue has ted, they are for tax purposes "treated alike".[8]

Although for the reasons stated we believe it is not of portance in the consideration of this case, we believe we ould mention briefly some of the misstatements and half- ths running through the Tax Court's opinion. The Court nd as a fact that:

> "Various procedures for paying the petitioner were discussed by Standard, Anglo, and petitioner. Among them was a proposal to purchase an annuity for petitioner from a commercial insurance company. This proposal was never accepted or put into effect" (R. p. 19).

vertheless, the Court persists in quoting from correspon- nce during the entire period, with an utter disregard of ich of the various procedures was being discussed. Thus, e Court twice quotes (R. pp. 33, 36) from a letter ted January 9, 1940 from Standard to Anglo in which ference was made to the money Anglo had provided "plus e additional amounts which Standard . . . will be required put up". This then is assumed to establish that Standard contributing to a retirement fund and would be required put up additional money. Carefully, any reference is

[8] See page 13, *supra*.

avoided to the letter three days later stating: "When I wrote you the other day, I failed to realize that you have a three-corner agreement. . . . This phase of the case has not been adequately considered" (R. p. 85). The later letter shows that the statements made in the letter of January 9 were made under a misunderstanding of the facts and were not accurate. Does the agreement of March 22, 1940 (R. pp. 23-26) require Standard "to put up" any additional amounts? The answer is "No". Standard, under that contract, received approximately $415,000 and became obligated to pay approximately $36,000 per annum. Standard assumed the risk, inherent in writing any annuity, that if the petitioner lived long enough, the payments to him would exceed the amount received. As compensation, it received the chance of a substantial profit if the petitioner did not survive. The petitioner would have to live more than 11 years before the $36,000 payments equalled the $415,000 received, and if any reasonable rate of income on the $415,000 is assumed, the period would be considerably lengthened. The petitioner has not yet lived even the 11-year period, and there is no more basis for assuming that Standard will ever have to "put up" anything than there would be in assuming that an insurance company having issued the same contract would have to "put up" anything.

Similarly, reference is made by the Court (R. p. 37) to a statement in a letter dated June 29, 1939 that "it is further proposed that Anglo transfer to S. O. of N. J. for deposit to the sub-account for assigned expatriates in the Annuity Fund the estimated present value of Anglo's liability". The Court then concludes, "This has the sound of mere contribution by Anglo to a general fund, rather than purchase of annuity." All of which is true, except that it has nothing to do with the contract of March 22, 1940. On June 29, 1939, Mr. F. W. Pierce "proposed" a deposit to a sub-account at a time long before the annuity arrange-

ent was agreed upon and clearly was one of the various ans considered but not consummated. Mr. F. W. Pierce, no wrote the letter of June 29, *1939,* was, incidentally, e same gentleman who on January 12, *1940* wrote that January 9, *1940* he "failed to realize" what the arrangeent then was (R. p. 85). At the time the letter of June , 1939 was written, the purchase of an annuity from an surance company was another of the plans still being nsidered as is shown by the references in the letter to nsuring" the pension and "premium refund" (R. p. 83). evertheless, that letter is considered by the Court as evince of what was the plan finally adopted.

The Court below (R. p. 37) and the respondent (Resp. rief p. 24) lay stress on the fact that a purchase of a milar annuity from an insurance company would have st about $499,000, whereas Anglo paid Standard only 15,000. These calculations were apparently based upon tes for particular annuity contracts issued by Equitable R. pp. 91, 92). These rates include the insurance comny's "loading" charge, which on a policy costing $491,000 ould amount to $40,000 (R. p. 85). Further, these parcular policies had features not included under the contract March 22, 1940. One of the policies was a participating olicy paying dividends estimated to be from approxiately 7½% to at least 8.8% per annum (R. p. 93). Under e other, "any surplus resulting by death shortly after tirement would be reflected in dividends" (R. p. 90). urther, the rates would be less if a non-par company were sed (R. p. 91). That Standard, which did not have to nsider "loading", which issued a contract not providing r dividends or any form of refund in the event of premare death and which may have been able to contemplate a gher rate of return, was willing to issue the contract for ss than a particular insurance company would charge for contract providing some additional benefits, establishes

nothing, other than the probable reason why Anglo bought the annuity from Standard rather than the insurance company.

In its opinion, the Court asks, "If, as in effect the petitioner argues, Anglo simply purchased an annuity contract from Standard as a mere vendor thereof, why should it be based in part on service rendered for earlier employers?" (R. p. 33.) The answer is not as the Court infers later in its opinion that "it is obvious from the fact of coverage of years prior to service with Anglo that it was doing so because of its relation to Standard, and not because the approximately 10 years of service performed by petitioner for Anglo required the 'contribution' of the full amount of 89,120 pounds sterling" (R. p. 38). Anglo paid 89,120 pounds sterling for the simple reason that that amount represented the capital sum of the liability which it then had to the petitioner and which it incurred under the resolution of its Board of Directors adopted October 22, 1931 (R. pp. 19, 23, 24). Anglo and no one else had that liability. Anglo incurred the liability because the petitioner when he went with the company "told them very 'plainly' " that he wanted it (R. pp. 17, 18).

The petitioner's request to Anglo in 1931 that he wanted his prior service to be considered and Anglo's agreement thereto is not an unusual circumstance. Any individual who had, through 28 years of service for one employer, built up substantial retirement benefits would indeed be extremely foolish to leave that employment unless the new employer agreed to compensate him fully for the valuable rights which he was surrendering by changing employment, whether the new employer were affiliated with the old or entirely unrelated. That is all that the petitioner did when he told Anglo "that he wanted to be considered on the same basis as those who were under the superannuation plan"

. pp. 17, 18). The Court below seems to think that since :h Imperial and Anglo were affiliates, Standard should ve assumed the retirement benefits which the petitioner d built up by his 28 years of service to Imperial and its edecessors. However, the fact is that Anglo, and not andard, assumed those obligations by the resolution of its ard of Directors (R. p. 19). The petitioner's services re to be rendered to Anglo, and not to Standard, and vas eminently proper for Anglo to pay the consideration essary to secure the services rendered to it. When glo paid the sum of approximately $415,000, it was pay- ; the actuarial capital value of the obligation which it n had to the petitioner, an obligation which it, and it ne had, and which it had incurred as part of the price securing the petitioner's services to it.

The foregoing examples demonstrate clearly, we believe, at the Court's opinion is not supported by evidence, sub- ntial or otherwise. In any event, the statements of the urt throughout its opinion, with the single exception of last paragraph, do not affect the basic legal question esented by this case. Did the execution of the contract March 22, 1940 result in the receipt of income by the titioner in 1940? The respondent recognizes that that the basic question when he says (Resp. Brief p. 24):

> "If the facts of this case were altered and it appeared that Anglo had used the sum of $415,000 to purchase an annuity policy from an insurance company, or if it had paid that sum to the taxpayer who in turn purchased the annuity, we would agree that the annual payments received by the taxpayer would have been controlled by Section 22 (b)(2) of the Internal Revenue Code, *supra.* In that event the sum of $415,000 would have constituted income to the taxpayer at the time of its receipt. *Hackett* v. *Commissioner,* 159 F. 2d 121 (C. C. A. 1st); *Oberwinder* v. *Commissioner,* 147 F. 2d 255 (C. C. A. 8th);

Hubbell v. *Commissioner,* 150 F. 2d 516 (C. C. A. 6th); *Ward* v. *Commissioner,* 159 F. 2d 502 (C. C. A. 2d)."

The respondent further admits that it is a fact "that Anglo paid Standard about $415,000 in consideration of Standard's promise to pay the taxpayer $3,038.75 per month . . ." (Resp. Brief pp. 19, 20).

For the reasons heretofore pointed out (pp. 11, *et seq.*) we submit that there is no basis in law for a decision distinguishing between a payment by Anglo of $415,000 in consideration of a Commercial Insurance Company's promise to pay the taxpayer $3,038.75 per month and a payment by Anglo of $415,000 in consideration of Standard's promise to pay the taxpayer $3,038.75 per month. Taxation is stated to be "an intensely practical matter". (*Farmer's Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204, 212.) There certainly is no practical difference between the two situations just mentioned. If the petitioner were here arguing that the contract of March 22, 1940 did not result in income to him in 1940, could he defend the assertion that he did have income by merely pointing out that Standard is not an insurance company? We feel certain that such a defense would not be accepted.

Dated: Los Angeles, California, May 11, 1948.

Respectfully submitted,

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